TM FEROZE KHAN & ORS

v.

MEERA HUSSAIN TM MOHAMED MYDIN

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
MOHDAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-16-97(A)]
26 MAY 1999

CIVIL PROCEDURE: *Striking out - Want of prosecution - Principles applicable - Writ action - Failure to take out summons for directions within one month - Delay prompted partly by difficulty in getting a sealed order from court - Whether delay inordinate and inexcusable - Whether adequately explained - Rules of the High Court 1980, O. 25 r. 1 (1)(b), O. 34*

The appellants ('the plaintiffs') and the respondent ('the first defendant') are the children of one Mohamed Mydin Merican ('the deceased'). In 1968, the deceased, who owned a piece of land in Georgetown, Penang ('the property'), executed a trust deed and transferred the property to himself as trustee for the first defendant. In 1992, after the deceased's death, the first defendant, by way of an originating summons ('the OS'), applied for and obtained a vesting order in respect of the property ('the vesting order').

On 15 January 1993 the plaintiffs filed a writ action ('the writ action') and applied for a declaration that the purported gift of the property to the first defendant was null and void. Thereafter, on 13 March 1993, the plaintiffs applied to intervene in the OS to set aside the vesting order.

The first defendant filed his defence to the writ action on 12 April 1994 and on 22 June 1995 the pleadings were closed. On 30 September 1995, the learned trial judge granted the plaintiffs leave to intervene in the OS, but ordered the plaintiffs to also apply for consolidation of the OS and the writ action. The plaintiffs, however, faced some difficulty in obtaining a sealed copy of the order of 30 September 1995, and so, could not promptly apply for consolidation. The facts showed that the plaintiffs only received the sealed order from the court sometime in late February or early March 1996.

In the meanwhile, by letter dated 8 March 1996, the first defendant reminded the plaintiffs to take out a summons for direction in respect of the writ action within 7 days. The plaintiffs deemed it untimely to do so before their application to set aside the vesting order was heard, and so ignored the reminder. Instead, on 21 March 1996, the plaintiffs applied for consolidation of the two actions, the application which was granted by the learned judge on 16 May 1996.

The first defendant alleged that the plaintiffs had failed to file the summons for direction within the requisite one month after the pleadings were closed, and applied for the writ action to be dismissed for want of prosecution. On 30 May 1996, the learned trial judge, subscribing to the argument, and invoking O. 25 r. 1(1)(b) Rules of the High Court 1980 ('the RHC'), dismissed the writ action. The plaintiffs appealed but the Court of Appeal ruled that the plaintiffs were guilty of a delay of 24 years and 9 months, beginning 1968, and so dismissed the appeal. The plaintiffs appealed to the Federal Court.

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] The power to dismiss an action for want of prosecution should be exercised only where (1) the default has been intentional and contumelious; or (2) (a) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) such delay will give rise to a substantial risk to a fair trial of the issues in the action or is likely to cause serious prejudice to the defendants.

[2] It was wrong for the learned trial judge to strike out the plaintiffs' writ for want of prosecution when barely 14 days earlier he had ordered the consolidation of the OS with the writ. By ordering consolidation, the learned trial judge must have considered it proper for the writ action to proceed and that there existed some common question of law or fact or some other reason rendering it desirable that the whole should be disposed of at the same time.

[3] There existed in this case two actions in tandem *ie*, the OS by the first defendant and the writ action by the plaintiffs, each with claims that are intricately related to those in the other. That being so, the steps taken by the plaintiffs in the writ action ought not to be viewed in isolation, but must be considered against the backdrop of the events taking place in the OS.

[4] The alleged delay ought to be considered in two time frames, namely (i) from 22 June 1995 to 30 September 1995; and (ii) from 30 September 1995 to 30 March 1996.

[4a] When the pleadings in the writ action were deemed to be closed on 22 June 1995, the plaintiffs had already filed the application to intervene in the OS, and the application was yet to be heard. Considering that one of the reliefs sought in the writ action was for a declaration that the 1968 trust deed and the memorandum of transfer were void, it is not unreasonable that the plaintiffs should choose to wait for the outcome

of their application before proceeding further with the writ action. The learned judge, in granting leave to intervene, had also directed the plaintiffs to apply for consolidation of the two actions, and this lent support to the reasonableness of the plaintiffs' stand. It ought also to be noted that the application to intervene was filed on 13 March 1993, but was only disposed of by the court on 30 September 1995. Clearly, since the matter was essentially in the hands of the court or the registry, no blame could be attributed to the plaintiffs for this delay. The alleged delay from 22 June 1995 to 30 September 1995 was not unreasonable, it being adequately explained by the plaintiffs.

[4b] The plaintiffs had taken all necessary steps to get the order of 30 September 1995 sealed, but only received the sealed order in late February or early March 1996. It may be argued that the plaintiffs, instead of applying for consolidation on 21 March 1996, should have applied for directions pursuant to O. 25 of the RHC. However, considering that there was a direction to consolidate the two actions, not much blame, if any, could be attached to the plaintiffs in acting the way they did. This is not a case where the plaintiffs had remained inexcusably and reprehensibly idle after being directed to apply for consolidation.

[5] There being no inordinate and inexcusable delay between 22 June 1995 and 30 March 1996, the plaintiffs' tardiness in instituting the action cannot in itself form the basis for dismissing the plaintiffs' action for want of prosecution. Also, since there has been no inordinate and inexcusable delay, the question of substantial risk for a fair trial or prejudice to the first defendant does not arise.

Obiter:

[1] The first defendant's application for dismissal of the action was grounded upon the failure of the plaintiffs in **setting down the action for trial** under O. 25 r. 1(1)(b) of the RHC. However, what is required of a plaintiff under r.1(1)(b) is **to take out a summons for directions** within one month after the pleadings were deemed to be closed rather than **setting down action for trial**. Setting down an action for trial comes under a different Order, namely O. 34 RHC

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu-perayu (plaintif) dan responden ('defendan pertama') adalah anak-anak kepada Mohamed Mydin Merican ('si mati'). Pada tahun 1968, si mati, yang memiliki sekeping tanah di Georgetown, Pulau Pinang ('harta tersebut'), memeterai satu surat-ikatan amanah dan memindahkan harta tersebut kepada dirinya selaku pemegang amanah kepada defendan pertama. Pada tahun 1992, selepas kematian si mati, defendan pertama, melalui suatu saman pemula ('SP'), memohon dan memperolehi satu perintah letakhak berhubung harta tersebut ('perintah letakhak').

Pada 15 Januari 1993, plaintif memfail satu tindakan writ ('tindakan writ') dan memohon perisytiharan bahawa pemberian harta tersebut kepada defendan pertama adalah tidak sah dan batal. Kemudiannya, pada 13 Mac 1993, plaintif memohon untuk mencelah di dalam SP bagi mengetepikan perintah letakhak.

Defendan pertama memfailkan pembelaannya kepada tindakan writ pada 12 April 1994 dan pada 22 Jun 1995 pliding ditutup. Pada 30 September 1995, hakim bicara bijaksana memberi kebenaran kepada plaintif untuk mencelah, tetapi memerintahkan supaya plaintif juga memohon untuk menyatukan SP dengan tindakan writ. Plaintif, bagaimanapun, menghadapi beberapa kesukaran untuk mendapat salinan bermeterai perintah bertarikh 30 September 1995, dan dengan itu, gagal memohon penyatuan dengan segera. Fakta menunjukkan bahawa plaintif hanya menerima perintah bermeterai dari mahkamah pada akhir Februari atau awal Mac 1996.

Dalam pada itu, melalui surat bertarikh 8 Mac 1996, defendan pertama mengingatkan plaintif supaya mendapatkan saman untuk arahan berhubung dengan tindakan writ dalam tempoh 7 hari. Plaintif berpendapat adalah tidak sesuai untuk berbuat demikian sebelum permohonan mereka untuk mengenepikan perintah letakhak didengar, dan dengan itu tidak menghiraukan peringatan tersebut. Sebaliknya, pada 21 Mac 1996, plaintif memohon untuk penyatuan kedua-dua tindakan, permohonan mana dibenarkan oleh hakim bijaksana pada 16 Mei 1996.

Defendan pertama mengatakan bahawa plaintif gagal memfailkan saman untuk arahan dalam tempoh sebulan selepas pliding ditutup, dan memohon supaya tindakan writ dibatalkan kerana ketiadaan pendakwaan. Pada 30 Mei 1996, hakim bicara bijaksana, menyetujui hujah ini, dan menggunapakai A. 25 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), membatalkan tindakan writ. Plaintif merayu tetapi Mahkamah Rayuan berkata plaintif telah berlengah selama 24 tahun dan 9 bulan, bermula 1968, dan dengan itu menolak rayuan. Plaintif merayu kepada Mahkamah Persekutuan.

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Kuasa untuk membatal sesuatu tindakan kerana ketiadaan pendakwaan harus hanya dilaksanakan di mana (1) kesalahan adalah disengajakan dan 'contumelious'; atau (2) (a) terdapat kelengahan yang melampau dan tidak termaaf di pihak plaintif atau peguam mereka, dan (b) kelengahan tersebut melibatkan risiko substantial bahawa isu-isu di dalam tindakan tidak dapat didengar dengan adil atau berkemungkinan akan menyebabkan prejudis serius kepada defendan.

[2] Ianya salah bagi hakim bicara bijaksana untuk membatalkan writ plaintif atas ketiadaan pendakwaan apabila hanya 14 hari sebelum itu beliau telah memerintahkan penyatuan writ dengan SP. Dengan memerintahkan penyatuan, hakim bicara bijaksana pastinya telah menimbang bahawa ianya adalah teratur bagi tindakan writ untuk diteruskan dan bahawa terdapat beberapa persoalan fakta dan undang-undang yang 'common' atau sesuatu sebab lain yang menjadikannya 'desirable' bahawa kesemua itu harus diputuskan pada masa yang sama.

[3] Terdapat dua tindakan yang seiring dalam kes ini, iaitu SP oleh defendan pertama dan tindakan writ oleh plaintif, yang masing-masing mengandungi tuntutan-tuntutan yang berhubungkait di antara satu sama lain. Dengan demikian, langkah-langkah yang diambil plaintif di dalam tindakan writ tidak boleh dilihat secara berasingan tetapi hendaklah dinilai dengan mengambilkira peristiwa-peristiwa di belakang SP.

[4] Kelengahan yang dikatakan di sini harus dilihat dalam dua jangka masa, iaitu (i) dari 22 Jun 1995 hingga 30 September 1995; dan (ii) dari 30 September 1995 hingga 30 Mac 1996.

[4a] Apabila pliding dianggap sebagai telah ditutup pada 22 Jun 1995, plaintif sudah pun memfail permohonan untuk mencelah di dalam SP, dan permohonan tersebut belum lagi didengar. Mengambilkira bahawa salah satu dari relif yang dipohon di dalam tindakan writ adalah untuk perisytiharan bahawa surat-ikatan amanah tahun 1968 dan memorandum pindahmilik adalah batal, maka adalah munasabah bagi plaintif untuk menunggu keputusan permohonan mereka terlebih dahulu sebelum meneruskan prosiding dengan tindakan writ. Hakim yang bijaksana, sewaktu memberi kebenaran untuk mencelah, juga memerintahkan supaya plaintif memohon untuk penyatuan, dan ini menyokong kemunasabahan pendirian plaintif. Harus juga diperhatikan bahawa permohonan untuk mencelah dibuat pada 13 Mac 1993, tetapi hanya diputuskan pada 30 September 1995. Oleh kerana halperkara tersebut berada di tangan

mahkamah atau pejabat pendaftar, plaintif jelas tidak boleh dipersalahkan kerana kelengahan ini. Kelengahan di antara 22 Jun 1995 dan 30 September 1995 yang dikatakan itu tidak boleh dikatakan tidak munasabah, kerana dijelaskan dengan secukupnya oleh plaintif.

[4b] Plaintif telah mengambil segala langkah perlu supaya perintah 30 September 1995 dimeterai, tetapi hanya menerima perintah bermeterai pada akhir Februari atau awal Mac 1996. Mungkin boleh dihujah bahawa plaintif sepatutnya memohon untuk arahan di bawah A. 25 KMT dan tidak memohon untuk penyatuan pada 21 Mac 1996. Walau apapun, memandangkan terdapat arahan untuk penyatuan kedua-dua tindakan, plaintif tidak boleh dipersalahkan sangat kerana bertindak seperti yang mereka lakukan di sini. Ini bukanlah suatu kes di mana plaintif menghabiskan masa begitu sahaja tanpa berbuat apa-apa selepas diarahkan supaya memohon untuk penyatuan.

[5] Oleh kerana tidak terdapat kelengahan yang melampau dan tak termaaf di antara 22 Jun 1995 dan 30 Mac 1996, kelambatan plaintif untuk meneruskan tindakan tidak boleh secara bersendirian menjadi asas bagi membatalkan tindakan plaintif kerana ketiadaan pendakwaan. Juga, oleh kerana tidak terdapat kelengahan yang melampau dan tak termaaf, isu risiko substantial terhadap suatu perbicaraan yang adil atau prejudis kepada defendan pertama tidak lagi timbul.

Obiter:

[1] Permohonan defendan pertama untuk membatalkan tindakan telah disandarkan kepada kegagalan plaintif untuk **setting down the action for trial** di bawah A. 25 k. 1(1)(b) KMT. Bagaimanapun, apa yang diperlukan dari seorang plaintif di bawah k. 1(1)(b) ialah **to take out a summons for directions** dalam tempoh satu bulan selepas pliding dianggap sebagai telah ditutup dan bukannya **setting down action for trial**. Setting down an action for trial berada di bawah Aturan yang berbeda, iaitu A. 34 KMT.

[Rayuan dibenarkan.]

Case(s) referred to:
Arab-Malaysia Finance Bhd v. Malacca Development Corp Sdn Bhd & Ors [1997] 3 CLJ 51 ***(cit)***
Balwant Singh v. R Rajasingam [1995] 4 CLJ 491 ***(cit)***
Birkett v. James [1978] AC 297 ***(foll)***
Biss v. Lambeth Health Authority [1978] 2 All ER 125 ***(refd)***
Datuk Samy Vellu v. Karpal Singh [1990] 1 CLJ 79 ***(cit)***
KS Chua & Co v. Chui Miang Chew [1996] 2 CLJ 676 ***(cit)***
Lee Boon Tin v. Trustees of Leong San Tong Khoo Kongsi [1996] 5 MLJ 601 ***(cit)***
Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia [1996] 2 CLJ 923 ***(cit)***
R Rajasingam v. Balwant Singh Purba [1996] 3 CLJ 222 ***(cit)***
Rath v. CS Lawrence & Partners [1991] 1 WLR 399 ***(refd)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1981] 1 CLJ 87 ***(cit)***
Vasudevan v. Damodaran & Anor [1981] 1 CLJ 84 ***(cit)***
Wong Sing Meng v. Wong Sam Moi [1991] 2 CLJ 1223 ***(cit)***

Legislation referred to:
Probate and Administration Act 1959, s. 39
Rules of the High Court 1980, O. 25 r. 1(1)(b), O. 34 rr. 2(2), 7A(1)

For the appellants - Hamid Sultan Abu Backer; M/s Hamid Sultan & Rakan-rakan
For the respondent - M Kanesan Muthusami; M/s Tawfeek Badjenid & Partners

[Appeal from Court of Appeal, Pulau Pinang; Civil Appeal No: P-02-372-96]

Reported by WA Sharif

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

Introduction

The learned trial judge had, on 30 May 1996, dismissed the writ action herein of the appellants/plaintiffs (hereinafter referred to as "the plaintiffs") for want of prosecution. On appeal, the Court of Appeal dismissed the appeal with costs. The plaintiffs then obtained leave to appeal to the Federal Court. After hearing arguments of counsel for both sides, we reserved judgment to a date to be fixed. We now give our judgment.

Background

The following facts are not in dispute.

The four plaintiffs were four out of the five children of one Mohamed Mydin Merican bin Meera Hussain (deceased) by his marriage to one KS Mahmootha Beevi (first wife) in 1931. Subsequently, in or about 1950, the deceased married one Fatimah Beevi. Out of his second marriage an issue was born, that is, the 1st respondent/1st defendant in this case (hereinafter referred to as "the 1st defendant").

It is also accepted that the deceased was the owner of a piece of land described as Lot 465, Sek 11-W Daerah Timur Laut, Georgetown, Penang on which nine houses were erected ("the property"). On or about 2 February 1968, the deceased transferred the property to himself as trustee for the benefit of the 1st defendant who was then only eight years old. The memorandum of transfer was registered at the Penang Land Registry. Supplemental to the transfer, the deceased, on the same day (*ie*, 2 February 1968), also executed a trust deed declaring himself to be trustee holding the land in trust for the 1st defendant and agreeing to transfer the land to any such person or persons as the 1st defendant might at any time direct.

On 12 October 1991, the deceased passed away.

Sometime in 1992, the 1st defendant took out an originating summons No. 24-553-1992 in the High Court in Penang and obtained in the said action an *ex parte* order dated 5 October 1992 (hereinafter referred to as the 'vesting order') vesting the property in his name.

On 15 January 1993 the plaintiffs filed the present action under appeal (*ie*, suit 22-19-93) and obtained an injunction from the High Court on the following day, (*ie*, 16 January 1993) restraining the 1st defendant by himself or his servants or agents or otherwise from dealing with the property until further order. On 13 March 1993 they also applied for leave to intervene in the 1st defendant's originating summons, which they obtained on 30 September 1995.

In their statement of claim, the plaintiffs contend, *inter alia*, that the purported gift of the property is null and void under Islamic law because the property was not then nor at any time thereafter in the possession of the deceased, and neither was the possession of the property ever handed to the 1st defendant during the lifetime of the deceased nor was it legally vested in the 1st defendant during the deceased's lifetime. The plaintiffs contend that since the gift was void, the property becomes part of the estate of the deceased, and until Letters of Administration is granted, the property would vest in the Official Administrator under s. 39 of the Probate and Administration Act 1959. The plaintiffs also aver that the 1st defendant had obtained the vesting order without first obtaining Letters of Administration of the deceased's estate and informing the deceased's beneficiaries (meaning, presumably, the plaintiffs) and had also intermeddled with the deceased's property and refused, despite repeated requests and demands from the plaintiffs, to account to the plaintiffs the monies received by the 1st defendant after the death of the deceased. The plaintiffs therefore claim that the 1st defendant is accountable to them as administrator de son tort. They also seek, *inter alia*, declarations that the trust deed dated 2 February 1968 and the purported transfer by way of gift *vide* the memorandum of transfer are null and void, that the deceased was, at all

material times, the legal beneficial owner of the property until his death, and that all the deceased's beneficiaries be beneficially entitled to the property according to the Islamic law of distribution of estates. The plaintiffs also claim an interlocutory injunction which, as mentioned earlier, was granted by the learned trial judge on 16 January 1993.

We would, for the sake of completeness, briefly advert to the 1st defendant's amended defence. The main contentions of the defence are that the gift is valid under the civil and the Islamic laws, and that the plaintiffs' claims are statute barred. Other than the above, the amended defence is mainly one of denial and putting the plaintiffs to strict proof of the allegations in the statement of claim.

As mentioned earlier, the 1st defendant applied and had the plaintiffs' action dismissed for want of prosecution by an order dated 30 May 1996 which was affirmed by the Court of Appeal and which precipitated the hearing of the appeal before us. Thus far, we have, in narrating the facts, purposely left out the events forming the backdrop of the 1st defendant's application for striking out the plaintiffs' action since we consider it more convenient to set out separately and in chronological order the happenings which are of importance in this appeal so as not to lose sight of the significance that ought to be duly attached to them.

The 1st Defendant's Application For Striking Out. (Summons In Chambers Dated 30 March 1996)

The 1st defendant in his application sought the dismissal of the plaintiffs' action for want of prosecution on the ground "bahawa plaintif-plaintif tidak menetapkan tindakan ini untuk perbicaraan ... dalam masa satu (1) bulan dari penutupan pliding seperti yang diperlu oleh A. 25 k. 1(1)(b)" *ie*, that the plaintiffs had failed to set down this action for trial ... within one month from the close of the pleadings as required by O. 25 r. 1(1)(b).

Before going into the merits of the application we would point out an anomaly. The 1st defendant's application for dismissal of the action was grounded upon the failure of the plaintiffs in **setting down the action for trial** under O. 25 r. 1(1)(b) of the Rules of the High Court 1980. However, what is required of a plaintiff under the said r. 1(1)(b) was and is **to take out a summons for directions** within one month after the pleadings were deemed to be closed rather than **setting down action for trial**. Setting down an action for trial comes under a different order, *ie*, O. 34 of the Rules of the High Court 1980. (see for example, O. 34 r. 2(2); O. 34 r. 7A(1)). This unfortunate mistake is also repeated in the brief affidavit of the solicitor for the 1st defendant made in support of the application. The only noteworthy deposition made by the

1st defendant's solicitor is his contention (not disputed by the plaintiffs) that he had, by a letter dated 8 March 1996 to the plaintiffs' solicitor, requested the latter to file a summons for directions within seven days from the receipt of the said letter, but to no avail.

The plaintiffs' affidavit in opposition sought to explain in some detail the steps they had taken since obtaining the interlocutory injunction against the 1st defendant. We shall, in a moment, outline chronologically those steps in tabular form. Briefly, their explanation for the delay was the difficulty they faced in obtaining a sealed copy of the order dated 30 September 1995 made in the originating summons giving them leave to intervene and directing them to apply for consolidation of the originating summons with the writ action. Counsel for the plaintiffs also deposed that there was then yet to be heard their application in the originating summons to set aside the vesting order, and that it was not timely to set down their writ action for trial until that application was heard.

By affidavit in reply, counsel for the 1st defendant contended that the order made in the originating summons had no relevance to the writ action and maintained that the plaintiffs must file the summons for directions within one month after the pleadings were closed.

The Learned Trial Judge's Judgment Dated 8 July 1996

The learned trial Judge, in dismissing the plaintiffs' action, was of the opinion that there was a delay of nine months from 22 June 1995 (the date on which he, on the 1st defendant's application, "accepted" the 1st defendant's defence and amended defence dated 14 April 1994 and 21 April 1994 respectively) to 8 March 1996 (when counsel for the 1st defendant wrote to plaintiffs' counsel requesting summons for directions to be taken out).

The Court Of Appeal Judgment Dated 2 October 1997

In concurring with the learned trial judge, the Court of Appeal agreed that the pleadings were deemed to be closed on 22 June 1995 and was of the view that the summons for directions should have been taken out on or before 21 July 1995.

On the period of delay, the Court of Appeal set back the period considerably by starting the countdown from 2 February 1968 *ie*, the date of registration of the transfer, thus adding 24 years to the nine months above-mentioned. The Court of Appeal also held that the plaintiffs' failure to comply with the 1st defendant's letter requesting them to file the summons for directions was contumelious. The Court of Appeal was also of the opinion that the delay was

long and deliberate and had prejudiced the 1st defendant in having the action "hanging over his head indefinitely, not knowing when it is going to be brought to trial". They considered it "a lame excuse" the plaintiffs' explanation that the delay to take out a summons for directions was caused by their (plaintiffs') having to wait for their application for consolidation to be approved by the court. The Court of Appeal opined that the plaintiffs could have applied for consolidation in the summons for directions and found no *bona fide* reason for the plaintiffs in not having so applied.

Chronology Of Events

For ease of reference and for a better appreciation of the arguments in this appeal, we propose to set down chronologically in tabular form the material dates and the steps taken in both the plaintiffs' writ action and the 1st defendant's originating summons. The more important dates are emphasised.

No.	Dates	Events
1.	5 October 1992	1st defendant obtained a vesting order against the property in his originating summons action.
2.	5 January 1993	Plaintiffs filed the writ of summons, the statement of claim, and the summons-in-chambers for interlocutory injunction.
3.	16 January 1993	Interlocutory injunction granted in the plaintiffs' writ action.
4.	13 March 1993	Plaintiffs applied to intervene and set aside the vesting order in the 1st defendant's originating summons.
5.	12 April 1994	1st defendant filed his defence in plaintiffs' writ action.
6.	**22 June 1995**	Learned trial Judge granted 1st defendant's application to admit his defence and amended defence.
7.	**30 September 1995**	Plaintiff's were granted leave to intervene in the 1st defendant's originating summons. In the same order the learned trial Judge directed the plaintiffs to apply to consolidate the 1st defendant's originating summons with their writ action.

No.	Dates	Events
8.	10 October 1995	Plaintiffs wrote to court for the notes of proceedings held on 30 September 1995 after the 1st defendant failed to tell them the exact terms of the said order.
9.	18 October 1995	Plaintiff's received the said notes of proceedings.
10.	20 October 1995	Plaintiffs sent a copy of the draft order of 30 September 1995 to 1st defendant's solicitor. (The draft was not returned by 1st defendant's solicitor.)
11.	18 November 1995	Plaintiffs' solicitor wrote to the 1st defendant's solicitor enquiring about the draft order but received no reply;
		By letter dated 29 November 1995, the draft order was sent to court without approval of 1st defendant's solicitor.
12.	In January 1996 (exact date not given in the plaintiffs' solicitor' affidavit)	Court Registry returned the approved draft order.
13.	24 January 1996	Plaintiffs' solicitor sent the approved order to court registry for sealing.
14.	Late February or early March 1996.	Court Registry returned the duly sealed Court order dated 30 September 1995.
15.	**8 March 1996**	1st defendant wrote to plaintiffs' solicitor requesting the latter, to file summons for directions in plaintiffs' writ action.
16.	21 March 1996	Plaintiffs applied in their writ action to consolidate the 1st defendant's originating summons with their writ action.
17.	**30 March 1996**	1st defendant applied to strike out the plaintiffs' writ action for want of prosecution.

No.	Dates	Events
18.	**16 May 1996**	Learned trial judge ordered consolidation of 1st defendant's originating summons with the plaintiffs' writ action.
19.	**30 May 1996**	Learned trial judge struck out plaintiffs' writ action for want of prosecution.

The Appeal To The Federal Court

Before us, counsel for the 1st defendant submitted that the consolidation order of 16 May 1996 did not reflect the order actually granted by the court because the relief sought in the plaintiffs' application dated 21 March 1996 was not for consolidation but for the 1st defendant's originating summons **to be heard together** with the plaintiffs' writ action.

We nave perused the order of the learned trial Judge dated 30 September 1995 in the 1st defendant's originating summons. It is clearly stated in the order that the plaintiffs were to "memohon menyatukan kes ini dengan kes No. 22-19-93". To our mind there is no reason for doubting that the plaintiffs had been directed to consolidate the originating summons with the writ action. The word 'menyatukan' (*ie*, consolidate) was also used by learned trial judge in his notes of proceedings dated 30 September 1995 exhibited in this appeal. Therefore there cannot be any ambiguity in the directive of the learned trial judge on this matter. Furthermore, the order of the learned trial Judge dated 16 May 1996 also decreed that 'Saman No. 22-19-1993 bersatukan dengan Saman Pemula No. 24-553-Tahun 1992 dan **hendaklah diteruskan sebagai satu tindakan**" (emphasis added). Again this order spoke of consolidating the two actions. Thus, we see no merit in the contention for the 1st defendant that the two actions were ordered to be heard together and not to be consolidated.

We now move on to the crux of the complaints of the plaintiffs.

For the plaintiffs, it was submitted that they had not been slack in prosecuting their action but had, on the contrary, been actively pursuing it. They contended that the writ action ought not be viewed in isolation but should be considered together with the 1st defendant's originating summons in tandem. In his affidavit, counsel contended that considerable time was taken before the order of 30 September 1995 directing them to consolidate the two actions were sealed. It is the plaintiffs' case that they needed the sealed order before they could apply for consolidation, and that they needed to consolidate the two actions before applying for the summons for directions.

Counsel for the 1st defendant submitted that the provision requiring the plaintiff to take out summons for directions within one month after the close of pleadings must be complied with and that in this case, despite the reminder dated 8 March 1996, the plaintiffs had failed to take out a summons for directions.

The Law

The principles of law on dismissal of actions for want of prosecution may be found in the following passage in the judgment of Lord Diplock in *Birkett v. James* [1978] AC 297 at 318:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

The above principles have been adopted by our courts in Malaysia see e.g. *Vasudevan v. Damodaran & Anor* [1981] 1 CLJ 84; [1981] 2 MLJ 150 FC; *Toh Hock Thye & Ors v. Toh Chwee Biow* [1981] 1 CLJ 87; [1982] 1 MLJ 152 FC; *R Rajasingam v. Balwant Singh Purba* [1996] 3 CLJ 222; [1996] 2 MLJ 549 CA; *Arab-Malaysia Finance Bhd v. Malacca Development Corp. Sdn. Bhd. & Ors* [1997] 3 CLJ 51; [1997] 5 MLJ 685; *Lee Boon Tin v. Trustees of Leong San Tong Khoo Kongsi* [1996] 5 MLJ 601; *Balwant Singh v. R Rajasingam* [1995] 4 CLJ 491; [1996] 4 MLJ 404; *KS Chua & Co. v. Chui Miang Chew* [1996] 2 CLJ 676; [1995] 4 MLJ 436; *Negara Properties Sdn. Bhd v. Akitek Bersekutu Malaysia* [1996] 2 CLJ 923; [1995] 2 MLJ 185; *Wong Sing Meng v. Wong Sam Moi* [1991] 2 CLJ 1223; [1991] 2 MLJ 277; *Datuk Samy Vellu v. Karpal Singh* [1990] 1 CLJ 79; [1989] 3 MLJ 493.

For the purpose of this appeal, we find it convenient to consider the alleged delay under two time-frames *ie*, from 22 June 1995 to 30 September 1995 and from 30 September 1995 to 30 March 1996.

22 June 1995 To 30 September 1995

This period covers the time when the pleadings were deemed to be closed (22 June 1995) to the date (30 September 1995) when the learned trial judge directed the plaintiff's to apply for consolidation of the two actions. We would test this period against principle 2(a) in *Birkett v. James, supra,* quoted above *ie*, whether the plaintiffs were guilty of inordinate and inexcusable delay in prosecuting their claim. Though no explanation specifically directed to this period was given, there is a general explanation in the affidavit of the plaintiffs' counsel that he could not "set the action down for trial" until the plaintiffs' application to set aside the "vesting order in 1st defendant's originating summons had been heard", and counsel expounded this before us.

Whether a delay of over three months is inordinate and inexcusable depends on the facts and circumstances of each particular case. In the instant case, the delay, in our view, had been adequately explained and is not unreasonable. There existed (and still exists) two actions in tandem (*ie*, the originating summons by the 1st defendant and the writ action by the plaintiffs) each with claims that are intricately related to those in the other. That being so, the steps taken in the plaintiffs' writ action ought not be viewed in isolation but have to be considered against the backdrop of the events taking place in the 1st defendant's originating summons. At the time the pleadings in the writ action were deemed to be closed, the plaintiffs had already filed the application seeking to intervene in the 1st defendant's originating summons, and the application was yet to be heard. Considering that one of the reliefs sought in the plaintiffs' writ action was for a declaration that the trust deed dated 2 February 1968 and the memorandum of transfer (transferring the property to the 1st defendant himself as trustee) were void, we do not think it unreasonable that the plaintiffs chose to wait for the outcome of their application before proceeding further with their writ action. To an extent, the fact that the judge subsequently, in granting the plaintiffs leave to intervene in the originating summons, had also directed the plaintiffs to apply for consolidation of the two actions lends support to the reasonableness of the stand of the plaintiffs to await the outcome of their application to intervene and to set aside the vesting order. Admittedly, this application of the plaintiffs, though filed on 13 March 1993, was, for reasons unknown to us, not finally disposed of by the court till 30 September 1995. This, however, is essentially a matter in the hands of the court or the registry. There is no reason (and, indeed, none has been advanced) why the plaintiffs should be blamed for it. We are therefore of the view that the alleged delay from 22 June 1995 to 30 September 1995 cannot be said to be inordinate and inexcusable.

30 September 1995 – 30 March 1996

Next, the second time frame between 30 September 1995 and 30 March 1996 (*ie*, from the time of the direction to consolidate the two actions to the date of the 1st defendant's application to strike out this action). The affidavit of the plaintiffs dated 10 April 1996 detailed the difficulty in extracting the orders granting them leave to intervene and showed that from the time the intervention order was given they had actively taken all the necessary steps to get the said order sealed. They received the sealed order in late February or each March 1996 and applied for consolidation of the two actions on 21 March 1996.

By a letter dated 8 March 1996, the defendants reminded the plaintiffs to take out a summons for directions within seven days. The plaintiffs did not do so but applied instead for consolidation of the two actions on 21 March 1996. It may be argued that the plaintiffs should have applied for directions pursuant to O. 25 of the Rules of the High Court 1980, under which the prescribed form provided for consolidation of actions. However, considering that there was a direction to the plaintiffs from the judge to consolidate the two actions, we do not think much blame, if any, can be attached to the plaintiffs in acting in the manner that they did *ie*, applying for consolidation rather than taking out a summons for directions. In any event, this is not a case where the plaintiffs had remained inexcusably and reprehensibly idle after being directed to apply for consolidation. In our view, there is no inordinate and inexcusable delay. For avoidance of doubt, we would add that in coming to the conclusion of no inordinate and inexcusable delay during the two time-frames, we are not unmindful of the following observation of Lord Denning MR in *Biss v. Lambeth Health Authority* [1978] 2 All ER 125 CA @ 132:

> It is, I believe, accepted on all hands that if the plaintiff is guilty of inordinate and inexcusable delay before issuing the writ, then it is his duty to proceed with it with expedition after the issue of the writ. He must comply with all the rules of court and do everything that is reasonable to bring the case quickly for trial. Even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution.

For the plaintiffs, counsel contended that the Court of Appeal erred in taking into account the 24 years prior to the issue of the writ. Counsel submitted that the plaintiffs were unable to institute the proceedings soon after the declaration of the trust and the transfer of the property to the deceased himself as trustee because under the Islamic law of succession the right of a beneficiary accrued only after the death of the donor. Furthermore, during the lifetime of the plaintiffs and the deceased, the deceased could perfect the gift anytime he desired. For the 1st defendant, counsel argued that a beneficiary could attack

the trust or any time, not necessarily after the death of the settlor. We find it unnecessary to deal with the arguments. Since we find that there had been no inordinate and inexcusable delay between 22 June 1995 and 30 March 1996, the plaintiffs' tardiness in instituting the action cannot in itself form the basis for dismissing the plaintiffs' action for want of prosecution. In *Birkett v. James* [1987] AC 297 HL Lord Diplock said: (p. 322 E-H)

> It follows a fortiori from what I have already said in relation to the effect of statutes of limitation upon the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.

Furthermore, since there had been no inordinate and inexcusable delay, the question of substantial risk for a fair trial or prejudice to the 1st defendant consequential upon the delay (principle 2(b) in *Birkett v. James* [1978] AC 297) does not arise.

The following observation in Slade LJ in *Rath v. CS Lawrence & Partners* [1991] 1 WLR 399 CA is significant. He said: (p. 411)

> The late issue of a writ is one thing; by itself it cannot be regarded a culpable. The casual and dilatory conduct of proceedings in breach of the rules, after a writ has been issued, is another thing. If a person who claims to have a cause of action chooses to take advantage of the process of the court by issuing a writ at whatever time during the limitation period, he has, in the words of Lord Diplock [1978] AC 297, 323, "corresponding right to continue to prosecute it to trial and judgment **so long as he does so with reasonable diligence**. (emphasis added)

For the plaintiffs, counsel contended that it was wrong for the learned trial judge to strike out the plaintiffs' writ action for want of prosecution when barely 14 days earlier he had ordered the consolidation of the 1st defendant's originating summons with the plaintiffs' writ action. In our view, there is some merit in the contention. The order for consolidation was made subsequent to the 1st defendant filing the application to strike out the plaintiffs' writ action. It is reasonable to assume that by ordering consolidation, the learned trial judge

must have considered it proper for the plaintiffs' writ action to proceed and that there existed some common question of law or fact or some other reason rendering it desirable that the whole should be disposed of at the same time.

For the above reasons, we conclude that the plaintiffs had not been guilty of such inordinate and inexcusable delay as warranting the dismissal of the action for want of prosecution. That being our conclusion, it is unnecessary to consider whether by reason of inordinate and inexcusable delay there exists any substantial risk of impossibility of a fair trial or whether the defendants would thereby be or likely to be seriously prejudiced (principle 2(b)) in *Birkett v. James, supra*).

The appeal is allowed with costs to the plaintiffs here and in the courts below. The order of the Court of Appeal and the order of the High Court made on 16 June 1997 and 30 May 1996 respectively are set aside. The deposits for this appeal and for appeal to the Court of Appeal be refunded to the plaintiffs. The case No. 22-19-1993 herein be restored and remitted to the High Court at Pulau Pinang for hearing in the usual way in accordance with the Rules of the High Court 1980.